STATEMENTS OF POLICY

Title 55—PUBLIC WELFARE

DEPARTMENT OF PUBLIC WELFARE

[55 PA. CODE CHS. 1101 AND 1187]

Medical Assistance Manual; General Provisions; Nursing Facility Services

Introduction

This statement of policy announces the guidelines the Department of Public Welfare (Department) intends to use to review requests of applicants or participating providers to increase the number of Medical Assistance (MA) certified nursing facility beds through the enrollment of new facilities or the expansion of existing certified facilities. Providers of intermediate services for the mentally retarded (ICF/MR), inpatient psychiatric services and inpatient rehabilitation services remain subject to §§ 1101.42b and 1101.77a (relating to Certificate of Need requirements for participation—statement of policy; and termination for convenience and best interests of the Department—statement of policy) as published on December 14, 1996 (26 Pa.B. 5996).

Background

The Department is the single State agency designated to administer the Commonwealth's Medicaid Program, which is known as the MA Program. The MA Program is a cooperative Federal-State program through which various health care services are provided to poor and needy individuals in this Commonwealth. As the single State agency, the Department is required by Federal law to adopt methods and standards that may be necessary to safeguard against the unnecessary utilization of services under the MA Program and to assure that MA payments are consistent with efficiency, economy and quality of services. See 42 U.S.C.A. § 1396a(a)(30)(A). Prior to December 18, 1996, the Department relied, in part, upon the Certificate of Need (CON) process to comply with these Federally prescribed standards.

The CON process was established under Chapter 7 of the Health Care Facilities Act (act) (35 P. S. §§ 448.701—448.712). The purpose of the CON process was to assure the quality of and access to health care services for Pennsylvanians while controlling health services costs by limiting the supply of certain clinically related health care services. Nursing facility services were included in the clinically related health care services subject to the CON process. Entities that desired to furnish these services were required to first obtain from the Department of Health (DOH) a determination of need for the proposed service in the region of this Commonwealth in which it would be offered. An entity could not obtain a license to operate in this Commonwealth as a nursing facility, nor could a licensed nursing facility expand its existing licensed capacity by more than 10 beds or 10%, whichever is less, over a 2-year period, without first having secured a CON or letter of nonreviewability.

The Department considered the CON requirement a mechanism to safeguard against unnecessary utilization of institutional services and to assure that the Department's payments for these services were consistent with efficiency, economy and quality of services. To participate as a nursing facility provider in the MA Program, an entity must be currently licensed by the DOH. See 55 Pa. Code § 1101.42(a) (relating to prerequisites for participation). Because possession of a CON was a necessary precondition to licensure, and licensure a necessary precondition to MA certification and enrollment, a prior determination of the need for the provider's services by the Commonwealth was a prerequisite to participation in the MA Program. Thus, the CON process had a substantial impact on the number and location of MA nursing facility providers in this Commonwealth.

On December 18, 1996, the provisions of the act relating to the CON process sunsetted. Nonetheless, the Department's obligation to guard against overutilization and misutilization of services and to avoid unnecessary costs to the MA Program remained. In order to continue to fulfill its Federal obligations, the Department, by statement of policy effective December 19, 1996, adopted an interim policy announcing that, as a general matter, it intended to exercise its discretion to terminate, or to refuse to enter into, a provider agreement with providers of intermediate services for the mentally retarded (ICF/MR), nursing facility services, inpatient psychiatric or inpatient rehabilitation services. See 26 Pa.B. 5996 (December 14, 1996). This interim policy was revised, effective August 11, 1997, to prohibit enrolled nursing facility providers from expanding their existing licensed bed capacity, under any circumstances, without first receiving an exception from the Department. See 27 Pa.B. 4005 (August 9, 1997). Under the initial interim policy, nursing facility providers were permitted to expand their existing licensed bed capacity by 10 beds or 10%, whichever was less, over a 2-year period.

Contemporaneous with the August 11, 1997 revision to the interim policy, the Department distributed copies of draft exception request guidelines to interested persons and made them available for public review and comment. On August 14, 1997, the draft guidelines were shared and discussed with the Pennsylvania Intra-Governmental Council for Long-Term Care. The Department also solicited public input at the September meetings of the Medical Assistance Advisory Committee (MAAC), as well as the Consumer, Fee-For-Service and Long-Term Care Subcommittees of MAAC. All comments were reviewed and considered when developing this final statement of policy.

Discussion

Currently, a large majority (81%) of licensed nursing facilities are enrolled MA providers. These facilities account for 93% of existing licensed nursing facility beds in this Commonwealth. When these MA certified beds are occupied, the Department records demonstrate that, more likely than not, they are occupied by MA recipients. In fact, the MA Program is the single largest purchaser of nursing facility services in this Commonwealth. During 1995, the MA Program paid for more than 66% of the days of service rendered to nursing home residents. In addition, recent data compiled by the Department reveals that day-one MA eligible recipients (individuals who are MA eligible on, or likely to become MA eligible within, 60 days of the date of their admission) account for a larger number of MA nursing facility paid days. In 1996, 78% of the MA recipients admitted to nursing facilities were day-one eligible. This figure represents a 20% increase in the number of MA day-one eligible admissions since 1994.

These data suggest that there is no systemic barrier that prevents MA recipients from receiving access to nursing facility services due to a lack of beds. Rather, the

Department has concluded that, as a general rule, the present complement of nursing facilities participating in the MA Program results in a more than adequate, if not an overabundant, supply of nursing facility beds for persons who qualify for MA nursing facility services. This conclusion is further buttressed by the most recent nursing home bed need projections of the DOH.

According to DOH, as of March 31, 1997, there were 94,531 nursing facility beds licensed to operate in this Commonwealth and an additional 4,673 beds approved for construction under CONs issued by the DOH prior to December 19, 1996. Based upon this existing complement of licensed/approved beds and the most recent census data available, and using the same need-based methodology contained in the State Health Services Plan, the DOH projects a surplus of 5,634 nursing facility beds Statewide through the year 2000.

In projecting the 5,634 bed surplus, DOH assumes that the existing approved and licensed beds in this Commonwealth are occupied at a rate of 95%. The Department noted, however, that the most recent information available to the Department indicates an overall occupancy rate of only 93%. While this discrepancy may not appear significant, it represents 1,891 beds. Thus, even if there was a need for, rather than a surplus of beds, 1,891 additional people needing nursing facility services could be served today, not by constructing new or expanded facilities, but simply by increasing the occupancy rates of existing facilities to 95%.

The Department also believes that there is an imbalance within the current publicly funded system of long-term care services. This imbalance is reflected in Pennsylvania's MA budget for fiscal year (FY) 1997-98. Under the current budget, the Department will spend more than $2 billion, or 35% of its entire MA budget, to provide nursing facility services to 73,141 MA recipients who represent only 4.1% of the total MA population in this Commonwealth. In contrast to the more than $2 billion budget for nursing facility services, the Commonwealth, through the Department and the Department of Aging, will spend only $76.2 million ($35 million of which are State lottery funds) on home and community-based services in lieu of nursing home services. If this imbalance is permitted to remain unchecked, it may contribute to an even greater increase in the existing surplus of nursing facility beds, and thereby limit the Commonwealth's choices by absorbing an even larger portion of the Commonwealth's scarce resources away from home and community-based services into more expensive institutional services.

Given the heavy dependence on public dollars to sustain the current institutional system of long-term care services, and the existing surplus of nursing home beds, the Department has determined that a policy, or the absence of a policy, that results in an unconstrained increase in the supply of nursing facility beds financed at taxpayer expense is unacceptable. Such an environment would serve only to promote inefficiencies in the system by further depressing occupancy rates of existing facilities, or enable costs to the Commonwealth to spiral by creating a demand for institutional services so that built beds can be filled beds. The Department believes that it is in the best interests of the residents of this Commonwealth with long-term services needs, as well as taxpayers of this Commonwealth, to develop a fuller array of long-term care supports and services. Such a belief is consistent with the recommendations submitted to the Governor by the Intra-Governmental Council on Long-Term Care. Since it is clear that the institutional component of the array is generally sufficient, the Department considers it appropriate to encourage the development of other components of the array of long-term care services, for example, home and community-based services, when instituting policies to identify and meet the needs of its MA population.

The Department's Policy Regarding Enrollment and Expansion of Nursing Facilities

In light of the foregoing discussion, the Department adopts the following policy with respect to the enrollment of new nursing facility providers and the continued participation of current nursing facility providers:

- The Department will exercise its discretion under 55 Pa. Code § 1101.42(a) to reject an application of a currently unenrolled nursing facility to become an enrolled MA provider of nursing facility services.

- The Department will exercise its discretion under 55 Pa. Code § 1101.77(b)(1) to terminate the enrollment of a provider that undertakes to increase the number of beds at its nursing facility.

- The Department will grant exceptions to its general policy when the Department finds that it is in the best interests of the Commonwealth and the MA Program to permit the enrollment of a new nursing facility provider or the expansion of an existing nursing facility provider.

This policy applies to any applicant seeking to enroll as an MA nursing facility provider or to any provider proposing to expand its existing number of certified beds. The policy does not automatically grandfather projects with approved CONs or letters of nonreviewability, whether already constructed, under development, or simply still in the planning stage, but requires the projects to receive an exception to enroll or expand. The policy also does not permit any unilateral incremental expansions by enrolled nursing facility providers, but requires the providers to seek an exception to expand.

Policy Regarding Projects With a CON or Letter of Nonreviewability

Although projects with CONs or letters of nonreviewability will not automatically be approved under this statement of policy, this statement of policy has been revised to provide special consideration to those applicants or providers that possess a CON or letter of nonreviewability. In evaluating these projects, the Department will, among other things, focus on whether: 1) the project is being implemented in accordance with the substantial implementation timetable (if the CON or letter of nonreviewability was issued within 24 months of the date of the exception request); 2) the project is substantially implemented as defined in 28 Pa. Code § 401.2 (if the CON or letter of nonreviewability was issued more than 24 months before the date of the exception request); 3) the applicant or provider presumed, as evidenced by the CON application, that it would participate in the MA Program and render services to MA recipients; 4) the applicant or provider is suitable, based on its licensure and Medicaid and Medicare Program participation record, for enrollment or expansion; 5) the applicant or provider will assure the Department that its project will achieve and maintain the estimated MA occupancy percentage set forth in its CON application; and 6) the applicant or provider will assure the Department that the new or additional beds will be economically and financially feasible without the receipt of MA capital component payments.

Projects that were not timely implemented in accordance with a CON or letter of nonreviewability may still be

approved if the applicant or provider can demonstrate that there was good cause for the delay. Good cause may be found, for example, if the applicant or provider halted or delayed its project in anticipation of the publication of this statement of policy.

Status of "10/10 Rule"

The Department chose not to incorporate the so-called "10/10 Rule" into this statement of policy. Under the CON process, a certain amount of incremental growth was permitted without a review of need. Specifically, an existing nursing facility could, on a biennial basis, increase the number of its beds by 10% or 10 beds, whichever was less, without obtaining CON from the DOH. As reflected by the revised interim policy eliminating the "10/10 Rule," the Department has determined that this incremental growth is no longer desirable or appropriate. In most areas, the quantity of beds available to MA residents exceeds the need. If the "10/10 Rule" were continued, and providers were permitted to add beds, that overall surplus would only be exacerbated. Furthermore, the "10/10 Rule" did not provide any assurance that the needs of the MA Program specifically, or the community generally, would be considered, let alone met, by these incremental expansions. To the contrary, since the demise of CON, the Department has noted that the large majority of "10/10" expansions have occurred not where there is indication of need, but in counties with existing bed surpluses. In addition, the Intra-Governmental Council on Long-Term Care recommended that the "10/10 Rule" be abandoned. For these reasons, the Department has decided to prohibit enrolled nursing facility providers from expanding under the "10/10 Rule" without first receiving an exception from the Department, and has declined to include a "10/10 Rule" in the following statement of policy. Consequently, if a provider currently enrolled in the MA Program increases the number of beds at its nursing facility without having been first granted an exception, the Department's policy will be to terminate that facility's provider agreement regardless of whether the increase meets or exceeds the former "10/10 Rule."

The Department's Process for Reviewing Exception Requests

The Department will not grant exceptions unilaterally, that is, in order for an applicant or provider to be granted an exception, it must affirmatively request one from the Department. Although persons filing exception requests may submit to the Department whatever information they deem relevant to the question of whether an exception should be granted in their particular circumstances, the Department strongly recommends that the applicant or provider include the information explicitly identified in the statement of policy as relevant to the exception request determination. Although the Department will consider all exception requests, the Department will not be able to grant an exception if it is not provided enough information to determine whether the proposed project is in the best interests of the Department. Submission of all information relating to provider suitability, as described in subsection (d)(6), is particularly important. The Department may in the future develop an application process for exception requests if it determines that such a process will make it easier for persons to organize and submit their requests, and for the Department to conduct its reviews.

The statement of policy provides that exception requests may be submitted at any time. Exception requests submitted by applicants or providers who seek to increase the number of MA-certified beds under a CON or letter of nonreviewability will be processed and considered as received by the Department, provided that the requests are submitted by the provider or applicant by April 13, 1998.

For applicants or providers who are not seeking to expand the number of MA-certified beds under a CON or letter of nonreviewability, the Department will accept requests over 6-month periods (January through June; July through December) and collectively consider them on a biannual basis. Thus, for instance, if the Department receives multiple exception requests involving a single service area experiencing a shortage of enrolled beds, the Department will weigh the relative merits of the various requests. The Department will then endeavor to address all of the exception requests by the end of the then-current 6-month period (that is, the 6-month period following the period in which they were submitted). If necessary, the Department may expedite its review and act on an individual request before the target date.

The statement of policy also provides an opportunity for public input regarding the exception requests submitted by applicants or providers who are not seeking to expand the number of MA-certified beds under a CON or letter of nonreviewability. Following the close of each 6-month period, the Department will publish a notice in the *Pennsylvania Bulletin* listing the exception requests and will make copies of the exception requests available to the public during regular business hours. The public will then have 30 days in which to submit written comments regarding those requests. Comments relating to exception requests received from December 1996 through June 30, 1997, have already been received and reviewed by the Department.

Applicants and providers who submitted requests received by the Department from December 1996 through June 30, 1997 (Group One-1997), will be given until February 1, 1998, to submit additional information relating to the exception requests. The Department will use its best efforts to issue decisions on Group One-1997 by March 31, 1998.

The Department's Guidelines for Reviewing Exception Requests

The Department will grant an exception to its general policy to deny enrollment and to preclude expansion if it determines that, in light of the particular facts and circumstances presented, increasing the number of MA-certified nursing facility beds is in the best interests of the MA Program. The Department plans to grant exceptions on a case-by-case basis. In reviewing exception requests, the Department will use the guidelines set forth in this statement of policy. A discussion of the guidelines the Department will use to review exception requests submitted by applicants or providers who are not seeking to expand the number of MA-certified beds under a CON or letter of nonreviewability is set forth as follows.

The Department considers the MA Program's need for additional nursing facility services in the applicant's or provider's primary service area as the most important factor in determining whether to grant or deny an exception request. The focus of the Department's analysis of "MA Program need" will be different from the focus of DOH's former CON review process. The DOH focused upon whether the community needed additional institutional health services. The Department's focus, on the other hand, will be more narrow, and will primarily consider whether the MA Program needs additional services, and, if so, how those services can be most appropri-

ately supplied. The Department is not attempting through its review process to prevent the construction of new or larger nursing facilities that will not rely on MA funds. Rather, the Department is seeking to prevent overutilization and misutilization of services and the costs attendant thereto under the MA Program while at the same time assuring that MA recipients have access to an appropriate array of long-term care services. Therefore, the broader needs of the community are relevant to the Department's analysis only to the extent that they affect the availability of beds to the MA Program and the availability of nursing facility services to MA recipients in those beds.

In considering its MA Program needs, the Department will also examine whether those needs can be appropriately met through the provision of home and community-based services rather than additional nursing facility beds. The Department views home and community-based services to have several important benefits. Among other things, many older residents of this Commonwealth and residents with disabilities prefer home and community-based services over institutional services. Given a choice, the Department believes that many people would choose to remain in their own homes and communities rather than reside in a nursing facility. Moreover, in many, if not most, instances, the Department has found that home and community-based services are less expensive than institutional services.

In addition to evaluating the option of home and community-based services to meet its needs, the Department will examine other factors in reviewing exception requests. These include: a willingness to commit to serve day-one MA eligible recipients; a willingness to serve technology-dependant MA recipients; the applicant's or provider's licensure record and its Medicaid and Medicare Program participation history during the past 3 years (including the record of any person having a reportable ownership interest in the provider or applicant); the feasibility of the project without MA capital payments; and a willingness to employ welfare and MA recipients.

Comments

Although this statement of policy will become effective on January 12, 1998, the Department will consider comments. In order to be considered, comments must be received within 45 days of the date of publication.

Persons with a disability may use the AT&T Relay Service by calling (800)654-5984 (TDD users) or (800) 654-5988 (Voice users). Persons who require another alternative should contact Thomas Vracarich in the Office of Legal Counsel at (717) 783-2209.

Contact Person

Comments and questions regarding this statement of policy should be directed to Policy Section, P.O. Box 8025, Harrisburg, PA 17105, (717) 772-2570.

Effective Date

This statement of policy shall take effect on January 12, 1998.

FEATHER O. HOUSTOUN,
Secretary

(*Editor's Note*: The regulations of the Department, 55 Pa. Code Chapters 1101 and 1187, are amended by amending statements of policy in §§ 1101.42b and 1101.77a and by adding a statement of policy at 1187.21a and 1187 Appendix C to read as set forth in Annex A.)

Fiscal Note: 14-NOT-161. No fiscal impact; (8) recommend adoption.

Annex A

TITLE 55. PUBLIC WELFARE

PART III. MEDICAL ASSISTANCE MANUAL

CHAPTER 1101. GENERAL PROVISIONS

PARTICIPATION

§ 1101.42b. Certificate of Need requirement for participation—statement of policy.

(a) Effective December 19, 1996, the Department will not enter into a provider agreement with an ICF/MR, nursing facility, an inpatient psychiatric hospital or a rehabilitation hospital unless the Department of Health issued a Certificate of Need authorizing construction of the facility or hospital in accordance with 28 Pa. Code Chapter 401 (relating to Certificate of Need program) or a letter of nonreviewability indicating that the facility or hospital was not subject to review under 28 Pa. Code Chapter 401 dated on or before December 18, 1996.

(b) The Department will consider exceptions to subsection (a) on a case-by-case basis. Exceptions requested by nursing facilities will be reviewed under § 1187.21a (relating to nursing facility exception requests—statement of policy).

FEES AND PAYMENTS

§ 1101.77a. Termination for convenience and best interests of the Department—statement of policy.

(a) Effective December 19, 1996, under § 1101.77(b)(1) (relating to enforcement actions by the Department), the Department will terminate the enrollment and direct and indirect participation of, and suspend payments to, an ICF/MR, inpatient psychiatric hospital or rehabilitation hospital provider that expands its existing licensed bed capacity by more than ten beds or 10%, whichever is less, over a 2-year period, unless the provider obtained a Certificate of Need or letter of nonreviewability from the Department of Health dated on or prior to December 18, 1996, approving the expansion. Effective August 11, 1997, under § 1101.77(b), the Department will terminate the enrollment and direct and indirect participation of, and suspend payments to, a nursing facility provider that expands its existing licensed bed capacity. A nursing facility provider that, prior to August 11, 1997, relied on the interim policy effective December 19, 1996, and substantially implemented a project to expand its facility by ten beds or 10%, whichever is less, within a 2-year period, will not be terminated from enrollment under this policy.

(b) The Department will consider exceptions to subsection (a) on a case-by-case basis. Exceptions requested by nursing facilities will be reviewed under § 1187.21a (relating to nursing facility exception requests—statement of policy).

CHAPTER 1187. NURSING FACILITY SERVICES

Subchapter C. NURSING FACILITY PARTICIPATION

§ 1187.21a. Nursing facility exception requests—statement of policy.

(a) *Scope.* This section applies to applicants and providers as defined in subsection (i).

(b) *Purpose.* The purpose of this section is to provide nursing facilities and other interested persons with notice of the guidelines that the Department intends to use in

exercising its discretion regarding enrollment and participation of nursing facilities as providers in the MA Program.

(c) *Policy regarding enrollment and expansion.*

(1) *General.*

(i) The Department, possessing the authority to regulate nursing facility participation in the MA Program, has discretion to refuse to enter into provider agreements with applicants and to terminate provider agreements with participating providers to protect and advance the best interests of the Department.

(ii) The Department has determined that, in most instances, the current complement of nursing facilities participating in the MA Program results in an adequate supply of nursing facility beds for persons who qualify for MA nursing facility services, and, therefore, in most instances, increasing the number of MA-certified nursing facility beds through the enrollment of new providers or the expansion of existing providers is not in the Department's best interests.

(iii) The Department has determined that, because in most instances an increase in the number of MA-certified beds is not in the Department's best interests, if an applicant or a provider desires to cause an increase, it is appropriate to require the applicant or provider to request the Department's prior approval and to bear the burden of demonstrating that, under the circumstances, an increase in the number of MA-certified beds is in the Department's best interests and that the applicant or provider should be allowed to provide those beds.

(2) *Policy regarding enrollment of applicants.*

(i) Except as noted in subparagraph (ii), when the Department receives an exception request from an applicant which, if granted by the Department, would cause a currently unenrolled nursing facility to become an enrolled MA provider of nursing facility services, the Department will, in the exercise of its discretion under § 1101.42(a) (relating to prerequisite for participation), deny that exception request.

(ii) The Department will make an exception to the policy in subparagraph (i) if, after considering the applicant's exception request in accordance with subsection (f) or (g), the Department determines that the applicant has demonstrated that its enrollment as an MA provider of nursing facility services is in the best interests of the Department.

(3) *Policy regarding expansion of providers.*

(i) Except as noted in subparagraph (ii), the Department will, in the exercise of its discretion under § 1101.77(b)(1) (relating to nursing facility exception requests—statement of policy), terminate the enrollment of a provider that undertakes to increase the number of licensed and MA-certified beds at its nursing facility and, further, will terminate the direct or indirect participation of that provider in the MA Program, and may suspend payments to that provider.

(ii) The Department will make an exception to the policy in subparagraph (i) if, after considering the provider's exception request in accordance with subsection (f) or (g), the Department determines that the provider has demonstrated that an increase in the number of the provider's licensed and MA-certified beds is in the Department's best interests.

(d) *Submission and content of exception requests.*

(1) An applicant or provider may make an exception request by submitting an original and two copies of its request to the Department at the following address:

Department of Public Welfare
Bureau of Long Term Care Programs
P. O. Box 2675
Harrisburg, PA 17105-2675
ATTN: MA/LTC Participation Review Unit

(2) Except as otherwise provided in subsection (f), an applicant or provider should submit its exception request to the Department prior to beginning construction of the new or additional nursing facility beds that will be the subject of its request.

(3) When an applicant submits an exception request to enroll as an MA provider, or a provider submits an exception request to expand the number of licensed and MA-certified beds at its nursing facility, the Department has no obligation to independently seek out any information on the question of whether the circumstances of that applicant or provider are such that an exception should be made. To the contrary, if an applicant or provider believes an exception should be made, the applicant or provider should submit to the Department information that the applicant or provider believes to be relevant to its request to enroll or expand.

(4) If an applicant or provider submits an exception request to the Department, the Department may base its decision solely upon the information supplied by the applicant or provider. The Department may request or consider additional information other than the information provided by the applicant or provider, including any public comments received on the exception request, and the information specified in subsections (f) and (g).

(5) To enable the Department to fully evaluate an exception request, the Department suggests that an exception request include the following information:

(i) An overview of the project which explains how it addresses the Department's goal to develop a fuller array of long-term care supports and services to meet the needs of its MA population and why it meets, or is needed to meet, the nursing facility service needs of the community.

(ii) A narrative and supporting documentation, if any, addressing each guideline in subsection (f) or (g) and indexed to identify which guideline is being addressed.

(iii) If the applicant or provider possesses a Certificate of Need (CON) and is seeking an exception under subsection (f), copies of the CON application.

(iv) Copies of any feasibility or market studies and financial projections prepared for the project, including any studies or projections identifying project costs, sources of project funds, projected revenue sources by payor type, including assumptions used and expected occupancy rates by payor type.

(v) A list of owners and related parties/entities involved in the project.

(vi) Independent audited financial statements, if any, of the applicant and provider, and owners or parent corporation, if any, of the applicant or provider for the most recent year prior to the fiscal year in which the exception request is filed.

(vii) Other information that the provider believes to be relevant.

(6) The Department requests that the applicant or provider specify in its narrative and supporting documentation relating to suitability under subsections (f)(10) and (g)(2), whether or not any of the following applies, and, if so, that the applicant or provider attach copies of all documents relating to the applicable action, including notices, orders, or sanction letters, received from the Health Care Financing Administration or any state Medicaid, survey or licensing agency:

(i) Whether the applicant, provider or any owner is currently precluded from participating in the Medicare Program or any state Medicaid Program.

(ii) Whether the applicant, provider or any owner owned, operated or managed a nursing facility that, at any time during the period specified in subsection (f)(10) or (g)(2) and one of the following applies:

(A) The applicant was precluded from participating in the Medicare Program or any state Medicaid Program.

(B) The applicant had its license to operate revoked or suspended.

(C) The applicant was subject to the imposition of sanctions or remedies for resident's rights violations.

(D) The applicant was subject to the imposition of remedies based on the failure to meet applicable Medicare and Medicaid Program participation requirements, and the facility's deficiencies immediately jeopardized the health and safety of the facility's residents; or the facility was designated a poor performing facility.

(e) *Consideration of exception requests.*

(1) Applicants or providers that possess a CON or letter of nonreviewability for their new or additional beds dated on or before December 18, 1996, may submit an exception request (if they have not already done so) under the guidelines in subsection (f), if the exception request is submitted by April 10, 1998. The Department will process and consider requests involving CONs or letters of nonreviewability as they are received. The Department will consider requests not submitted within this 90-day period under the guidelines in subsections (e)(2)—(5) and (g).

(2) The Department will consider all other exception requests under subsection (g) biannually in two groups as follows:

(i) Group One will consist of exception requests received January 1 through June 30. The Department will use its best efforts to issue decisions on Group One exception requests by the following December 31.

(ii) Group Two will consist of exception requests received from July 1 through December 31. The Department will use its best efforts to issue decisions on Group Two exception requests by the following June 30.

(3) Applicants or providers that submitted exception requests received by the Department between December 1996 through June 30, 1997 (Group One-1997) will be permitted until February 10, 1998, to submit additional information relating to their exception requests. The Department will use its best efforts to issue decisions on Group One-1997 by March 31, 1998.

(4) Following the close of each 6-month request period, the Department will publish a notice in the *Pennsylvania Bulletin* listing the exception requests included in the Group under consideration. For a 30-day period following publication of the notice in the *Pennsylvania Bulletin*, the Department will make copies of the requests in that Group available for review by the public during regular business hours, and will accept written comments related to the requests in the Group.

(5) The Department may expedite its review and act on an individual request before the target date.

(f) *Consideration of exception requests made by applicants and providers possessing CON or letters of nonreviewability dated on or before December 18, 1996.* In considering whether an applicant or provider has demonstrated that an increase in the number of MA-certified beds is in the Department's best interests, the Department will use the following guidelines and will consider the following information in evaluating the request:

(1) Whether the applicant or provider possesses a CON or letter of nonreviewability dated on or before December 18, 1996, authorizing the construction of new or additional nursing facility beds.

(2) Whether the Department of Health has issued a license to the applicant or provider authorizing it to operate the new or additional beds.

(3) If the applicant's or provider's CON or letter of nonreviewability was issued within 24 months of the date of its written notice to the Department, whether the applicant or provider demonstrates to the satisfaction of the Department that it is implementing its approved project in accordance with the substantial implementation timetable included in its approved CON application or, if not, whether there is good cause for the delay.

(4) If the applicant's or provider's CON or letter of nonreviewability was issued more than 24 months before the date of its written notice to the Department, whether the applicant or provider demonstrates to the satisfaction of the Department that it has substantially implemented its project as defined in 28 Pa. Code § 401.2 (relating to definitions), as effective December 18, 1996, or, if not, whether there is good cause for the failure.

(5) Whether the applicant or provider demonstrates to the satisfaction of the Department that, in determining that its project was economically and financially feasible, it presumed that it would participate in the MA Program and render services to MA recipients.

(6) For an applicant that possesses a CON for the new beds, whether the applicant will agree to provide written assurances to the Department that it will serve at least that percentage of MA recipients specified in its CON application, and that it will admit day-one MA recipients on a first-come/first-served basis as necessary to achieve and maintain that MA percentage on an ongoing basis.

(7) For a provider that is seeking to expand its number of licensed and certified beds under a CON, whether the provider will agree to provide written assurances to the Department that it will serve at least that percentage of MA recipients specified in its CON application, and that it will admit day-one MA recipients on a first-come/first-served basis as necessary to achieve and maintain that MA occupancy percentage.

(8) For a provider that is seeking to expand its number of licensed and certified beds under a letter of nonreviewability, whether the provider will agree to provide written assurances to the Department that it will serve at least that percentage of MA recipients necessary to achieve an MA occupancy rate equal to its MA occupancy rate percentage in effect during the most recent 12-month fiscal period ending prior to its written request to the Department, and that it will admit day-one MA recipients on a first-come/first-served basis as necessary to achieve and maintain that MA occupancy percentage.

(9) Whether the applicant or provider will agree to provide written assurances to the Department that the construction of its new or additional beds will be economically and financially feasible without the receipt of MA capital component payments and that it is not entitled to MA capital component payments related to the new or additional beds.

(10) Whether the applicant or provider has demonstrated suitability for enrollment or expansion. In determining whether an applicant or provider is suitable, the Department will consider the record of licensure and Medicaid and Medicare Program participation of the applicant, provider and any owner of the applicant or provider subsequent to the issuance date of the CON or letter of nonreviewability.

(g) *Guidelines for evaluation of all other exception requests.* Except for those exception requests reviewed under subsection (f), the Department will use the following guidelines and will consider the following information in evaluating an exception request:

(1) *MA Program's need for additional nursing facility beds.* The Department will determine whether the MA Program needs additional nursing facility beds in the applicant's or provider's primary service area and, if so, whether the applicant or provider has demonstrated to the Department's satisfaction that it will meet that MA Program need. The Department will consider information as may be provided by the applicant or provider to show that a need for additional MA-certified nursing facility beds exists in the applicant's or provider's primary service area. The Department regards the following information as relevant to the determination of MA Program need:

(i) The extent to which MA recipients have access to nursing facility services in the applicant's or provider's primary service area.

(ii) The extent to which day-one MA recipients and technology-dependent MA recipients have access to nursing facility beds in the applicant's or provider's primary service area.

(iii) Whether, and to what extent (expressed as a percentage of MA occupancy), the applicant or provider is willing and able to admit and serve day-one eligible MA recipients.

(iv) Whether the applicant or provider is willing and able to admit and serve technology-dependent MA recipients.

(v) Whether there are any alternatives to an increase in the number of MA-certified nursing facility beds, such as an increase in home and community-based services, that would be less costly, more efficient or more appropriate in meeting any MA Program.

(vi) Except for those exception requests involving nursing facility beds licensed prior to March 31, 1997, whether there is a need for additional nursing facility beds in the applicant's or provider's primary service area. In determining whether such a bed need exists, the Department will consider whether, and to what extent, the applicant's or provider's primary service area involves a county with bed shortages or surpluses, as set forth in Appendix C. Occupancy rates in the applicant's and provider's primary service area are also relevant to this determination.

(2) *Suitability.* The Department will determine whether the applicant or provider has demonstrated suitability for enrollment or expansion. In determining whether an applicant or provider is suitable, the Department will consider the record of licensure and Medicaid and Medicare Program participation of the applicant, provider and any owner of the applicant or provider beginning 3 years prior to the date of the exception request.

(3) *Economic and financial feasibility without MA capital component payments.* If an applicant's new beds or the provider's additional beds will be ineligible for capital cost reimbursement under § 1187.113(a) (relating to capital component payment limitation), the Department will consider whether the applicant or provider will agree to provide written assurances to the Department that the construction of its new or additional beds will be economically and financially feasible without the receipt of MA capital component payments and that it is not entitled to MA capital component payments related to the new or additional beds.

(4) *Employment of welfare and Medical Assistance recipients.* The Department will consider whether an applicant or provider will commit to employ welfare or medical assistance recipients in its new or expanded facility.

(h) *Time lines for completion of approved projects.* Applicants or providers who are granted exceptions shall provide written assurances to the Department that the construction of the new or additional beds will be completed in sufficient time so that the beds may be licensed, certified and available for occupancy within 3 years from the date the Department approves the applicant's or provider's enrollment or expansion, or another date as may be specified by the applicant or provider and agreed to by the Department.

(i) *Definitions.* For purposes of this section, the following words and terms, have the following meanings, unless the context clearly indicates otherwise:

Applicant—A person who submits a request to the Department which, if granted, would cause a nursing facility not presently enrolled in the MA Program to become a participating provider of nursing facility services to MA Program recipients.

Day-one MA eligible—An individual who is eligible for nursing facility services under the MA Program of the Commonwealth, or becomes eligible for nursing facility services under the Commonwealth's MA Program within 60 days of the date of the individual's admission to a nursing facility.

Exception request—A request by an applicant to enroll in the MA Program as a nursing facility provider or, in the case of an MA nursing facility provider, to expand its licensed and MA-certified bed capacity.

Owner—A person having an ownership interest, as defined in section 1124(a) of the Social Security Act (42 U.S.C.A. § 1320a-3(a)), in an applicant or provider.

Person—A natural person, corporation (including associations, joint stock companies and insurance companies), partnership, trust, estate, association, the Commonwealth, and any local governmental unit, authority and agency thereof.

Primary service area—The county in which the facility is or will be physically located. If the applicant or enrolled provider can demonstrate to the Department's satisfaction that at least 75% of its residents will originate from another geographic area, the Department will consider that geographic area to be the applicant's or provider's primary service area.

Provider—A person that is a participating provider of nursing facility services enrolled in the MA Program. If a person owns or operates more than one nursing facility,

the term refers only to the enrolled nursing facility which seeks an exception to expand the number of licensed and certified beds at its facility.

Technology-dependent—In need of a respirator for survival.

APPENDIX C

Nursing Home Bed Need Projection Through Year 2000				
HPA/County	*Projected Nursing Home Bed Need*	*INH Beds Licensed/ Approved 03/31/97*	*HB/SNF Beds Licensed/ Approved 03/31/97*	*(Shortage)/Surplus*
Bucks	3,209	3,840	81	712
Chester	2,306	2,517	63	274
Delaware	4,188	5,184	119	1,115
Montgomery	5,526	6,825	126	1,425
Philadelphia	11,839	9,783	424	(1,632)
HPA I Total	27,068	28,149	813	1,894
Berks	2,806	2,887	93	174
Carbon	526	441	0	(85)
Lehigh	2,309	2,915	92	698
Monroe	825	481	23	(321)
Northampton	1,882	2,006	0	124
HPA II Total	8,348	8,730	208	590
Lackawanna	2,007	2,271	52	316
Luzerne	3,074	3,170	31	127
Pike	349	200	0	(149)
Schuylkill	1,428	1,678	0	250
Wayne	437	431	0	(6)
Wyoming	214	214	0	0
HPA III Total	7,509	7,964	83	538
Adams	629	933	0	304
Cumberland	1,449	2,204	0	755
Dauphin	1,841	2,136	18	313
Franklin	945	1,029	18	102
Lancaster	3,163	4,327	66	1,230
Lebanon	898	1,348	19	469
Perry	267	304	0	37
York	2,492	2,421	0	(71)
HPA IV Total	11,684	14,702	121	3,139
Centre	622	673	35	86
Clearfield	720	711	29	20
Clinton	317	329	0	12
Columbia	493	574	0	81
Jefferson	446	484	14	52
Juniata	186	230	0	44
Lycoming	928	1,162	0	234
Mifflin	414	415	0	1

Nursing Home Bed Need Projection Through Year 2000				
HPA/County	*Projected Nursing Home Bed Need*	*INH Beds Licensed/ Approved 03/31/97*	*HB/SNF Beds Licensed/ Approved 03/31/97*	*(Shortage)/Surplus*
Montour	182	338	30	186
Northumberland	867	1,088	15	236
Snyder	263	241	0	(22)
Tioga	348	268	0	(80)
Union	286	410	28	152
HPA V Total	6,072	6,923	151	1,002
Allegheny	11,010	8,897	610	(1,503)
Armstrong	712	424	25	(263)
Beaver	1,487	1,309	50	(128)
Butler	1,192	1,645	19	472
Fayette	1,258	694	59	(505)
Greene	370	242	20	(108)
Indiana	609	594	18	3
Lawrence	849	914	92	157
Washington	1,743	1,380	60	(303)
Westmoreland	3,062	2,520	125	(417)
HPA VI Total	22,292	18,619	1,078	(2,595)
Cameron	53	40	0	(13)
Clarion	333	365	10	42
Crawford	685	875	32	222
Elk	297	258	0	(39)
Erie	1,896	2,148	49	301
Forest	48	100	0	52
McKean	416	598	0	182
Mercer	1,028	1,122	98	192
Potter	156	176	0	20
Venango	431	584	16	169
Warren	349	467	16	134
HPA VII Total	5,692	6,733	221	1,262
Bradford	511	465	0	(46)
Sullivan	72	190	0	118
Susquehanna	359	261	0	(98)
HPA VIII Total	942	916	0	(26)
Bedford	406	205	0	(201)
Blair	1,106	1,187	17	98
Cambria	1,376	1,258	39	(79)
Fulton	101	57	0	(44)
Huntingdon	333	302	0	(31)
Somerset	640	709	18	87

Nursing Home Bed Need Projection Through Year 2000				
HPA/County	*Projected Nursing Home Bed Need*	*INH Beds Licensed/ Approved 03/31/97*	*HB/SNF Beds Licensed/ Approved 03/31/97*	*(Shortage)/Surplus*
HPA IX Total	3,962	3,718	74	(170)
State Total	93,569	96,454	2,749	5,634

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